EME COURT U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. [redacted]
229

VANCE A. DOBBINS, JR., and JERRY CALVIN SMITH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit.

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VANCE A. DOBBINS, JR., and JERRY CALVIN SMITH,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit.

Petitioners, Vance A. Dobbins, Jr., and Jerry Calvin Smith, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the case of Vance A. Dobbins, Jr., and Jerry Calvin Smith, Appellants, vs. United States of America, Appellee, No. 26,228 in that Court on March 12, 1969 and the order filed April 9, 1969 denying petition for rehearing.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto and identified as page 161 in Transcript of Record, Volume II, certified by the Clerk of the United States Court of Appeals for the Fifth Circuit.

In an order filed May 13, 1969, the appellants' motion for recall and stay of judgment, issued as mandate, was granted by the United States Court of Appeals for the Fifth Circuit.

JURISDICTION.

This Court's jurisdiction is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED.

The questions presented by this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit include:

1. The denial to the petitioners of their right to due process of law in a fair trial resulting from the repeated and constant gross interference and active participation of the Trial Judge in the trial to an extent so as to take over the conduct of the whole trial; and

2. The petitioners were charged with and convicted of violating 18 U.S.C.A. 2315, while the proof, if any, was relevant to 18 U.S.C.A. 2314, prescribing a separate and distinct offense.

STATUTORY PROVISIONS INVOLVED.

Petitioners were charged with an offense under 18 U.S.C.A. 2315, which provides:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any * * * money of the value of $5,000 or more, * * * moving as, or which are a part of, or which constitute interstate * * * commerce, knowing the same to have been stolen * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C.A. 2314, in contrast, provides that:

> "Whoever transports in interstate or foreign commerce any * * * money, of the value of $5,000 or more, knowing the same to have been stolen, * * *."

STATEMENT OF THE CASE.

Petitioners, both residents of Chattanooga, Tennessee, were indicted under 18 U.S.C.A. 2315 charged with unlawfully, wilfully and feloniously receiving, concealing, and storing * * * money of the value of in excess of $5,000.00, to wit, a rare coin collection, which was moving in interstate commerce from * * * Tennessee to * * * Florida * * * knowing the same to have been stolen.

The trial was had on May 1, 1968 before the Honorable Joseph P. Lieb, District Judge, at Tampa, Florida.

The jury returned a verdict of guilty of the offense charged on May 3, 1968 after two days of confusion, all as more particularly set out hereinafter, and as more fully illustrated by the constant intercession of the trial judge in criticising both counsel, admonishing witnesses, and completely taking over the case, the degree to which can be appreciated only by a reading of the transcript in its entirety. The influence on the jury was obvious.

REASONS FOR GRANTING THE WRIT.

The instant case illustrates the wisdom of this Court in providing, in Rule 19 1(b), for granting the writ of certiorari where a Court of Appeals has affirmed the actions of a District Judge in a trial which so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

I.

An appreciation of how the Trial Judge "took over" the entire trial can only be achieved by a close scrutiny of the transcript. Isolated examples cannot demonstrate the impact upon the jury of the constant injection of authority, inquisitiveness, castigation of counsel, defendants, and

witnesses, and repeated caustic comments reflecting on the need for haste toward a conclusion. The hostility shown upon the trial is vividly depicted in the record despite the inanimateness of the printed pages in which, inherently, there is but slight opportunity to reflect the massive participation in and dominating impact of the caustic spoken words of the Trial Judge upon the jury.

The intrusions of the Trial Judge foreclosed impartiality. *Bollenbach v. U. S.*, 326 U.S. 607; *Wilson v. U. S.*, 250 F.2d 312; *Brock v. North Carolina*, 344 U.S. 424; *Riley v. Goodman*, 315 F.2d 232; *Herron v. So. Pac. Co.*, 283 U.S. 91; *Sunderland v. U. S.*, 19 F.2d 202; *Robertson v. State*, 38 Tex. 187; *Grock v. U. S.*, 298 Fed. 544; *People v. Mendes*, 3 N.Y. 2d 120, 164 N.Y.S. 2d 401; *U. S. v. Hill*, 332 F.2d 105; *Jackson v. U. S.*, 329 F.2d 893; *Hall v. State*, 165 So. 2d 345; *Baker v. U. S.*, 357 F.2d 11, at page 14; *Hellman v. U. S.*, 339 F.2d 36; *Herman v. U. S.*, 289 F.2d 362, at pages 365-366; *Moore v. Dempsey*, 261 U.S. 86; *Rideau v. Louisiana*, 373 U.S. 723, 726; *Brown v. Mississippi*, 297 U.S. 278, 285; *Jianole v. U. S.*, 299 Fed. 496, 499; *Gallaghan v. U. S.*, and *Colwell v. U. S.*, 299 Fed. 172, 175; *Henry v. U. S.*, 204 F.2d 817; *Hunter v. U. S.*, 62 F.2d 217, 220; *Blumberg v. U. S.*, 222 F.2d 496, 501.

Bollenbach and *Wilson* command a Trial Judge to be impartial, indifferent to the parties and cautious of any suggestion of partiality else the proceedings will be fatally infected. *Brock* and *Riley* are to the effect that judicial propriety must be measured on a case to case basis. *Herron* prescribes guidelines for judicial conduct. In *Sunderland* it is said that a trial judge should not constantly interrupt attorneys with admonitions to be brief, and, along with *Robertson*, dictate that even where the comments of the trial judge appear routine, when viewed independently, the aggregate may reveal a clear and con-

sistent pattern of judicial bias. *Grock* states that it is a fundamental right of a defendant, and his attorney, to be free of treatment by the trial judge which prejudices the rights of a defendant and is a matter of right not indulgence. Similarly, *People v. Mendes* commands this conduct by a trial judge to witnesses. *Hill* and *Jackson* criticize the taking over on cross-examination of witnesses by the trial judge. *Hall* illustrates the error attaching to a trial judge's conveyance of disbelief in a defendant's testimony. The Fifth Circuit in *Baker,* while reversing on other grounds, admonished the trial court not to do again on re-trial what he had done on the original trial. In *Hellman* Judge Gewin of the Fifth Circuit, cautioned that a trial judge must be abundantly careful to refrain from becoming an advocate. In *Herman,* Judge Wisdom of the Fifth Circuit, said "We do not approve of a trial judge asking so many questions that he appears to take the case away from the attorneys." *Moore* announces that a constitutionally unfair trial results where the barriers and safeguards are relaxed or forgotten, and becomes a spectacle (*Rideau*) or merely an ordeal (*Brown*) far short of a disciplined contest producing truth. *Jianole, Gallaghan* and *Colwell* all point up the impact of a trial judge's comment and conduct on a jury to the detriment of a defendant. *Henry,* and *Quercia v. U. S.,* 289 U.S. 466, 470 enunciate Chief Justice Hughes' condemnation of extra-judicial influences on a jury by the words and action of a trial judge. Oft repeated caustic comments from a trial-bench prejudices a jury. 88 *C.J.S.,* Trial, Sections 49-51 and 23 *C.J.S.,* Crim. Law, Sections 987, 989-991 and 993(b).

The instant transgressions of the trial judge are condemned under *Hunter* and *Blumberg* and are clearly distinguished from *Hellman.* Only by a reading of the tran-

script can the participation of the trial judge in the instant case be appreciated, and even then the demeanor and tone-implications cannot be ascertained on appeal as they were demonstrative before the jury.[1]

While the lifting from isolated context of one or more remarks by the trial judge may not afford criticism, when viewed in the aggregate record, a pattern of such conduct reveals a clear and consistent bias, subtle and unobtrusive but with a sum effect denying a fair trial. *Sunderland v. U. S., supra.*

II.

Petitioners stand convicted on a charge under 18 U.S.C.A. 2315. The offense proscribed there is receiving, concealing, storing, bartering, selling or disposing of money of the value of $5,000 moving as, or which is a part of interstate commerce, knowing it to have been stolen.

Significantly, and distinguished, is the offense proscribed by 18 U.S.C.A. 2314. The offense under Sec. 2314 is the transporting in interstate commerce of any money in an amount of $5,000 or more, knowing the money was stolen.

The money which is the subject matter of the act prohibited by Section 2315 is that which is moving in

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[1] See: R., p. 151, lines 13-14, A., p. 71, illustrative:
"Trial by Jury," Gilbert & Sullivan, circa 1876,
"* * * All the legal flurries seize you;
No proposal seems to please you;
I can't stop up here all day;
I must shortly go away; * * *."

Story of Gilbert & Sullivan. Goldberg, New York, Simon and Schuster 1928; R., p. 160, lines 20-22, A., p. 72, lines 4-6; R., p. 165, A., p. 75, lines 10-13; R., pp. 169-177, A., pp. 78-86, particularly R., p. 177, lines 6-22, A., p. 86, lines 7-24 in criticism of witness Dr. Anderson; R., pp. 433-434, A., pp. 144-146.

interstate commerce when obtained by the one so charged, while the act prohibited by Section 2314 is doing with it something chronologically subsequent to the act prohibited by Section 2315.

Two distinct acts are proscribed: the act prohibited by Section 2315 is the taking of the money from an interstate shipment, while the act prohibited by Section 2314 is doing something with the money after it is first obtained, hence the violation described in Section 2314 must of necessity occur subsequent to the taking of it from an interstate shipment. Had the Congress intended otherwise, there would have been no need to enact two sections, one would have sufficed; hence the legislative intent was to provide for two distinct crimes, neither of which is included in the other.

While there may have been a possible assumption by the jury, under the proof adduced in this case, to reach a verdict of guilty under Section 2314, there was a total absence of proof as to a violation of Section 2315 as charged in the indictment.

The charge in the indictment, for which the petitioners stand convicted, is wholly different than the proof adduced. The petitioners stand convicted of one offense while the proof went to another, hence the verdict is not responsive to the indictment. The conviction of petitioners upon a charge not included in the indictment is error.

CONCLUSION.

This Honorable Court should grant this petition for a writ of certiorari to review the errors of the Court of Appeals for the Fifth Circuit in affirming the conviction of petitioners resulting from the errors committed in the District Court, doing so particularly in the exercise of this

Court's exercise of the power of supervision of the lower courts' conduct.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

VANCE A. DOBBINS, JR., and JERRY CALVIN SMITH,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Middle District of Florida.

(March 12, 1969)

Before PHILLIPS,* BELL and MORGAN,
Circuit Judges.

PER CURIAM: This is an appeal by Vance A. Dobbins, Jr., and Jerry C. Smith from a jury conviction of having violated 18 U.S.C. § 2315. The crime involved is the receiving and concealing more than $5,000.00 in stolen goods, which goods constitute interstate commerce, and knowing the same to have been stolen. The goods are rare coins which had been stolen from a coin collector named Anderson in Chattanooga, Tennessee, in December, 1966. The estimated value of the coins was $225,000.00, including 189 rolls of one-cent pieces with a market value in excess of $41,000.00.

Bernhard Gould, a coin dealer in Sarasota, Florida, stated under oath that coins of the same description as that of the stolen coins were presented to him by the

* Judge Phillips of the Tenth Circuit, sitting by designation.

defendants. Some of the rolls of coins that defendants attempted to sell had Anderson's name written thereon. However, no sale was consummated. Additionally, Edward Brody, a Rossville, Georgia, jeweler, who had been previously convicted of his part in the same crime, testified that Dobbins stated the coins had previously been in Florida, that the asking price for the coins was $40,000.00, and that the coins he saw matched the coins stolen from Anderson in several particulars. As a defense, Dobbins took the stand to deny the statements made by the witnesses for the prosecution. Smith did not testify.

Both Dobbins and Smith allege various errors committed by the trial Court, none of which are well taken. As to the allegation that the comments of the judge were prejudicial, we dismiss such claim as spurious on its face. The trial Court did not abuse its discretion to direct the trial in an orderly manner. *Hellman v. United States,* 339 F. 2d 36 (5 Cir., 1964). Moreover, a review of the record reveals ample evidence to support a denial of a motion for a directed verdict [i.e. judgment] of acquittal. The facts outlined above need not be restated. *Jones v. United States,* 391 F. 2d 273 (5 Cir., 1968).

The third contention that it was erroneous to admit Edward Brody's testimony is equally groundless. Such testimony had a proper place in the trial.

The decision of the District Court is affirmed as to all issues presented on appeal.

AFFIRMED.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

(March 12, 1969.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

ORDER OF THE COURT OF APPEALS DENYING REHEARING.

(April 9, 1969.)

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 229

VANCE A. DOBBINS, JR. and JERRY CALVIN SMITH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of willful receipt and concealment of a rare coin collection, of a value in excess of $5,000, which was moving in interstate commerce and which they knew to be stolen, in violation of 18 U.S.C. 2315. Petitioner Dobbins was sentenced to five years' imprisonment; petitioner Smith received a three-year

prison term. The court of appeals affirmed *per curiam* (Pet. App. 9-10).

In summary, the government's evidence showed that in late December 1966, the home of Dr. E. R. Anderson of Chattanooga, Tennessee, was burglarized and his coin collection was stolen (Tr. 80-81, 133-134, 143).[1] The total value of the stolen coins was estimated by Dr. Anderson to be about $225,000, including 189 rolls of pennies having a value of over $40,000 (G. ex 1; Tr. 113, 119). Shortly thereafter, in early January 1967, petitioners met with Bernhard Gould, a coin dealer in Sarasota, Florida, in an effort to sell the coin collection (Tr. 220-224). Certain of the rolls of pennies which petitioners showed Gould bore the identification markings that Dr. Anderson had put on his collection (Tr. 229, 234-236). Petitioner Dobbins told Mr. Gould that they would take $40,000 for the entire lot (Tr. 243). No sale was made (Tr. 248).

Also in early January 1967, petitioner Dobbins spoke to a Rossville, Georgia, retail jeweler, Edward Brody, concerning the disposal of a coin collection (Tr. 317-320). Dobbins told the jeweler that the coins had been left in Florida because the "F.B.I. were right behind them" (Tr. 340-341). Later that month, Brody obtained a buyer for the coins (Tr. 343) and, on January 26, 1967, petitioner Dobbins and a companion brought the coins to his store (Tr. 344). Either petitioner Dobbins or his companion told Brody that the coins came from Anderson's home

[1] "Tr." designates the trial transcript on file with the Clerk.

(Tr. 348-349). Dobbins said they would take $25,000 for the coins (Tr. 352-354). Before the sale could be consummated, the F.B.I. arrested Brody and seized a substantial portion of the coins (Tr. 355-359).

1. Petitioners' principal contention is that the trial judge deprived them of a fair trial by virtue of his "constant injection" into the trial, his "castigation" of counsel and witnesses and his "repeated caustic comments reflecting on the need for haste toward a conclusion" (Pet. 3-4, 5-6). Petitioners further contend that the court's alleged interference in this regard cannot be demonstrated by "[i]solated examples," but only by a "close scrutiny" of the entire transcript (Pet. 3). The court of appeals found that the "trial court did not abuse its discretion to direct the trial in an orderly manner." (Pet. App. 10). Examination of the transcript (on file with the Clerk of this Court) supports that conclusion. The trial judge conducted the proceedings fairly and participated only to the extent of seeking to have all relevant evidence put before the jury. Defense counsel at trial raised no objection to the comments or conduct of the trial judge.

2. Petitioners were properly charged and convicted under 18 U.S.C. 2315. The elements of the offense are the theft of property of a prescribed value, its movement in interstate commerce and the receipt of the property while it is part of interstate commerce knowing that it has been stolen. *Corey* v. *United States*, 305 F. 2d 232, 235-236 (C.A. 9), certiorari denied, 371 U.S. 956. Here the evidence established

the interstate shipment from Chattanooga, Tennessee, to Sarasota, Florida, petitioners' awareness of the theft and their concealment of the coins while they remained part of interstate commerce. That petitioners might also have been convicted of the transportation of the stolen coins in interstate commerce, in violation of 18 U.S.C. 2314, had they been indicted under that section, does not preclude their conviction under Section 2315. See *United States* v. *Pearce*, 275 F. 2d 318, 325 (C.A. 7).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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WILL WILSON,
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BEATRICE ROSENBERG,
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AUGUST 1969.

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PETITION FOR REHEARING

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UNITED STATES OF AMERICA,
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PETITION TO REHEAR

Petitioners, Vance A. Dobbins, Jr. and Jerry Calvin Smith, petition for a rehearing on their petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit which petition was denied upon October 13, 1969.

Petitioners respectfully submit that upon a close and appreciative reading of the record in this cause it is inescapable that the similarity to what this Honorable Court previously condemned in *Ballenbach v. U. S.*, 326 U.S. 607, concerning the intrusions of the trial judge resulting in a foreclosing of impartiality, is applicable here.

It is recognized no hard and fast ground rules for measuring the intrusions of a trial judge can be formulated and that each case must be scrutinized standing alone. *Brock v. North Carolina*, 344 U.S. 424; *Riley v. Goodman*, 315 F.2d 232.

Robertson v. State, 38 Tex. 187 and *Sunderland v. U. S.*, 19 F.2d 202 caution that the aggregate of the remarks by the trial judge may well reflect prejudice even though such remarks when viewed independently would fail to be prejudicial.

Here the trial judge took over the cross-examination of witnesses and became the prosecutor. *U. S. v. Hill*, 332 F.2d 105, *Jackson v. U. S.*, 329 F.2d 893.

It is noted that the Court of Appeals to which the petition for a writ of certiorari was sought has itself in the past criticized the very same practice complained of here. *Baker v. U. S.*, 357 F.2d 11, 14; *Hellman v. U. S.*, 339 F.2d 36. In *Herman v. U. S.*, 289 F.2d 362, 365-366, Judge Wisdom for the Fifth Circuit spoke affirmatively and in disapproval of a trial judge who asked many less questions than did the trial judge in the instant case.

Upon a whole reading of the record, it is respectfully submitted, there should be here applicable the same criticism enunciated by Chief Justice Hughes referred to in *Henry v. U. S.*, 204 F.2d 817, and in *Quercia v. U. S.*, 289 U.S. 466, 470.

The United States admits the existence of two distinct offenses under 18 U.S.C. 2314 and 18 U.S.C. 2315 and then cites *Corey v. United States*, 305 F.2d 232, 235-236 (C.A. 9), certiorari denied, 371 U.S. 956 (Memorandum, p. 3), for the distinction, and that a defendant may properly be convicted of both offenses if so charged in sepa-

rate counts of an indictment. Petitioners agree, however, this is not the instant case because Petitioners were indicted on but one count, 18 U.S.C. 2315.

The United States, citing *United States v. Pearce*, 275 F.2d 318, 325 (C.A. 7), then says "That petitioners *might* also have been convicted of the transportation of the stolen coins in interstate commerce, in violation of 18 U.S.C. 2314, *had they been indicted under that section*, does not preclude their conviction under Section 2315." (Emphasis added). This avoids the instant question.

In *Pearee* the defendants were indicted and convicted for (1) transporting stolen furs, and (2) receiving and concealing the same furs. Circuit Judge Major, for the Seventh Circuit, while reversing defendants' conviction on other grounds (unlawful search and seizure) said that a defendant; indicted for both transporting and receiving and concealing, may be convicted under both charges. While there is abundant authority to support this proposition the Petitioners were not charged with multiple offenses. The distinction is at once obvious. The question here is not whether they could be convicted of the offenses proscribed by 18 U.S.C. 2315 and 2314 but whether they can be convicted of the violation of 18 U.S.C. 2315 when the proof goes to 18 U.S.C. 2314.

It is most respectfully submitted that in order to implement this Honorable Court's power of supervision over the lower courts in their conduct of orderly proceedings, this Court should, upon this petition for rehearing, vacate the order denying the petition for a writ of certiorari and grant the writ so that this whole case could come under the judicial scrutiny of this Court for resolution upon the substance after a detailed presentation of the case has been made to this Court.

WHEREFORE, it is prayed that this petition to rehear under Rule 58 be granted.

Respectfully submitted,

H. H. GEARINGER,
101 Professional Building,
Chattanooga, Tennessee 37402,

Attorney for Petitioners.

October 27, 1969.

CERTIFICATION

I, H. H. Gearinger, Attorney for petitioners, certify that the foregoing Petition to Rehear is not filed for any purpose of delay but for what is believed to be good cause on the facts and law and in the belief this Honorable Court should review the record in order to pass fully upon the merits thereof.

H. H. GEARINGER